90-932

No.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

GAYLE SCHREIER AND IRWIN SCHREIER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether frequent Flyer Awards or Coupons are property rights within the parameters of the wire fraud statute, 18 U.S.C. section 1343.

2. Whether the mileage accumulated to obtain frequent flyer awards belongs to the passenger or to the airline.

3. Whether the accumulation of mileage credit in a manner which contravenes a company-made rule constitutes a scheme to defraud under 18 U.S.C. Section 1343, where the company received revenue and/or consideration for the very mileage that it claims it was defrauded into crediting.

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Petitioners respectfully pray that a writ of certiorari issue to review the opinion of the Court of Appeals decided and filed July 13, 1990.

Opinion Below

The opinion (per Logan J. and Baldock J.) and special concurrence (per Dumbauld District Judge) of the Court of Appeals is reported as United States v. Gayle Schreier and Irwin Schreier, 908 F.2d 645 (10th Cir. 1990) (Appendix A). The order of the Court of Appeals denying the petition for rehearing was entered on August 8, 1990 (Appendix B).

Jurisdiction

The opinion of the Court of Appeals (Appendix A) was decided and filed on July 13, 1990, and a timely petition for rehearing was denied by order of the Court of Appeals for the Tenth Circuit on August 8, 1990 (Appendix B). An extension of time was previously granted by this Court allowing this Petition for Writ of Certiori to be served and filed

on December 6, 1990.

Statutory Provisions

Title 18, United States Code, Section 1343, provides:

> Fraud by wire, radio, or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purposes of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Statement of the Case

On November 2, 1988, the grand jury returned a superseding indictment which charged defendant Gayle Schreier and her father, Irwin Schreier, with one count of

conspiracy to commit mail and wire fraud (Count 1), twenty-five counts of wire fraud in violation of 18 U.S.C. Section 1343 (Counts 2 through 26) and two counts of mail fraud in violation of 18 U.S.C. Section 1341. (Counts 27 and 28).

The case centers around the conduct of petitioner Gayle Schreier where she would book airline reservations and obtain tickets for her clients through World Travel, a travel agency located in Tulsa, Oklahoma. (Tr. 474-75). Ms. Schreier was also engaged in a business known as "coupon brokering." Coupon brokering involves the obtaining of coupons (or certificates) issued by airlines to "frequent flyer" passengers. The coupons are issued to account holders who have accumulated the requisite number of miles to obtain free airline tickets or other benefits. American Airlines has

a frequent flyer program called the "Aadvantage" program.

Ms. Schreier's activities as a "coupon broker" relating to American Airlines consisted of: (1) obtaining coupons from Aadvantage members and using the coupons to obtain American Airlines tickets for one of her clients; or (2) having people fly on American Airlines' flights to accumlate mileage into member accounts. This was done with both the consent of the travel agency and sales representatives of American Airlines. In this way, mileage from multiple passengers could be pooled into one Aadvantage account.[1] When sufficient

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[1] At trial, Mr. Johnson, the owner of World Travel agency, testified that as early as 1982 or 1983 he had a conversation with American Airlines' district sales manager, Mike Stewart, in which Stewart stated that American Airlines did not care whether Ms. Schreier "was flying people around under other

miles were accumulated into an account, an award would be requested which would then be sold or used to obtain airline tickets for one of her clients.

Ms. Schreier was assisted by one of World Travel's full-time travel agents, Ms. Judy Wilson. World Travel also provided Ms. Schreier with the computer access code and a key to the World Travel office so that she could do work "after hours" in order not to displace full time travel agents. (Tr. 451-52; 479)

Evidence showed that Ms. Wilson, already familiar with the Sabre computer and procedures for making name changes,

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names and this sort of thing, as long as American was getting paid for the tickets." (Tr. 455). Ms. Wilson, the travel agent who taught Gayle Schreier how to use the computer, also testified that she understood American Airlines' position to be that American was aware Ms. Schreier flew people under different names, but did not care as long as it was paid for the tickets. (Tr. 482-83)

taught Ms. Schreier how to use the computer and assisted Ms. Schreier in pooling mileage credit into one account. (Tr. 484-485) To assist in this process, Ms. Wilson found reservations in the American Airlines computer (referred to as a "PNR" or "passenger name record"), changed the name on the reservation to a name and added an AAdvantage account number, which would then be credited with the miles flown. (Tr. 484-487) This activity was, according to Ms. Wilson, "an open, above-board transaction that went on many times at World Travel." (Tr. 485).

The evidence at trial also showed that American Airlines was well aware of Ms. Schreier's activities long before the conduct charged in the indictment. Although "pooling miles" and other "coupon brokering" activities violated

the frequent flyer rules established by American Airlines, the airline did not object because it was earning revenue for the airline tickets purchased to accumulate these miles.[2] The court instructed the jury that coupon brokering and mileage pooling activities - even though they violated the rules of American Airlines - were not illegal. (See Tr. 14, 42, 100, 119-120). FBI agent Martin Weber also testified that although such conduct may have been against American Airlines' frequent flyer rules, it did not violate federal law. (Tr. 265; 337-38).

To distinguish the above conceded legal activities (Tr. 8-9; 580; 588-89), the government attempted to show the jury how the accumulation of miles as alleged

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[2] See footnote 1.

in the indictment was illegal. The distinction which the government advanced was that Schreier made entries into the American Airlines' computer system, changing the alleged nonmember name to "G. Johnson", and entering the corresponding Aadvantage account no. KV75878. (Tr. 320-22, Superseding Indictment, p. 8-10). According to the government's theory, and as accepted by the court, these acts were different than the lawful conduct of mileage pooling.

The evidence actually presented at trial failed to support the distinction argued by the government. First, government witness Judy Wilson testified that to assist Gayle Schreier in the lawful activity described as "pooling miles," she, Judy Wilson, would make computer entries into American Airlines' computer changing passenger names and

inserting Aadvantage account numbers supplied by Ms. Schreier. (See Tr. 484-85) These type of name changes were also made by American Airlines' own reservationist. (Tr. 389-90) The conduct of Wilson and American Airlines' reservationist was not unlawful, because the government presumed the passengers were Aadvantage members and consented to the name change and the transfer of mileage credit. This legal conduct of Wilson, American's own personnel and Ms. Schreier herself was never distinguished from the specific acts of Ms. Schreier alleged in the indictment to be illegal because the government never proved that (1) the passengers were non-AAdvantage members;and (2) the passengers did not consent to the transfer of mileage credit.

Contrary to the government's theory,

the evidence at trial showed that the mileage credit accumulated by each of the twenty-five passengers listed in the indictment belonged to the passengers and was not the property of American Airlines. There was no evidence that the mileage was transferred without the passengers' consent or that the passengers were nonmembers of the program. Therefore, there was no evidentiary basis for the jury to distinguish the indicted conduct from the lawful activity of "pooling miles." Evidence at trial demonstrated that American Airlines was "paid for the Aadvantage miles that gave birth to the coupons" that were then properly redeemed for tickets. (Tr. 498-99). The defense position was that the specific activity of accumulating miles by Schreier was not illegal as it did not deprive American of

money or property. (Tr. 573-576).

The case was tried before a jury in January 1989 in the Northern District of Oklahoma, with Judge Thomas Brett presiding. At the conclusion of the trial, the government dismissed counts 27 and 28, (the mail fraud counts) and therefore 26 counts were submitted to the jury. On February 1, 1989, the jury returned verdicts of guilty as to both defendants on the twenty-six counts.

Defendants filed timely motions for judgment of acquittal and arrest of judgment under Rules 29 and 34, Fed.R.Crim. which the court denied. (Order, March 13, 1989, doc. no. 55). Thereafter, the trial court permitted defendants to file renewed motions under Rules 29 and 34. (Transcript of April 10, 1989 hearing, pp. 6-8). (See Supplement to Rule 29 and 34 Motion,

filed April 26, 1989, docu. nos. 63, 64; and Addendum to Defendants' Rule 29 Motion, filed June 26, 1989, doc. no. 73). The motions showed the government had offered false or misleading testimony at trial; and that there was not a sufficient evidentiary basis to support defendants' convictions. In response to these motions, the government conceded their witness had presented "mistaken" testimony (Government's Supplementary Response to Defendants' Supplement filed May 24, 1989, doc. no. 68, page 6), but argued that the admission was harmless error.

Prior to sentencing and while these renewed post-trial motions were pending, the Government and defendants reached a post-trial agreement. The government agreed to confess defendants' renewed Rule 29 and Rule 34 motions as to all

counts but Count 2, as to defendant Irwin Schreier, and Counts 2 and 3 as to defendant Gayle Schreier, in exchange for the defendants agreeing to withdraw their motions as to the remaining counts. Accordingly, Irwin Schreier was ultimately adjudicated guilty of Count 2; Gayle Schreier was ultimately adjudicated guilty only of Counts 2 and 3; and all other counts, including the conspiracy count, were dismissed with prejudice. Finally, the defendants and government agreed to limit the appellate issues on Counts 2 and 3.

On July 13, 1989, Judge Brett entered judgment on the one count against defendant Irwin Schreier and the two counts against defendant Gayle Schreier. Sentences were imposed against both defendants. Both defendants were released pending appeal. On July 21,

1989, both defendants filed timely notices of appeal.

On appeal to the United States Court of Appeals for the Tenth Circuit, Petitioners Argued, inter alia, that the government's proof was fatally flawed because it did not show that Petitioner's acquired property of American. If they acquired property at all, it was not property of American but that of the passenger who flew the miles.

The Tenth Circuit's basic premise for upholding the convictions was that: (1) a transfer of mileage from nonmember passengers to members occurred; and (2) this transfer created "a liability that otherwise would not exist."

However, there was no evidence that the passengers were non members or that the mileage was transferred without their consent. In fact, on page two of its

result-oriented opinion the Tenth Circuit acknowledged this critical and material failure on the part of the government and stated that "the record does not reflect whether the actual passengers, whose names were replaced in the airline computer, were members of Aadvantage." (Emphasis Added). And yet, in it's opinion at page five, the Tenth Circuit disregarded this statement and came to the erroneous conclusion that: "liability was created on American's books through a transfer of mileage from nonmember passengers to members and that American was thus the victim of the fraud because it thereby owed a liability that otherwise would not exist." (Emphasis Added). The Tenth Circuit's conclusion on page five was the basis of affirming the convictions, and is in error because it is inconsistent and incompatible with

the trial record and the Tenth Circuit's own finding on page two of its opinion.

The government alleged that the Schreier's caused mileage to be credited to accounts they controlled. American then issued coupons to be exchanged for travel based on the mileage in the accounts. The assumption of the government at trial, and of the Tenth Circuit on appeal was that liability in the form of mileage was created that would not otherwise exist for American because the passengers had never joined the program by becoming AAdvantage members. This is not the case.

Certain departments at American Airlines advertised and promoted the accumulation of mileage credit to the public, while other departments worked to reduce this accumulated mileage liability of the actual members. (See footnote 3,

infra). American anticipates a certain number of passengers will claim mileage, thereby creating liability for American. Of course American, like other airlines with frequent flyer programs, would prefer to fulfill the barest minimum of this potential liability created by the Aadvantage program.[3] The critical

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[3] In TransWorld Airline v. American Coupon Exchange, Inc., 913 F.2d 676 (9th Cir. 1990), the manager of TWA's Frequent Flyer Program stated:
"Q: You are saying TWA didn't want them all [the awards] used?
A: Any time you can avoid paying a debt, why not."

. . .

"A: The award is the liability side of the equation.
Q: You are stating that you perceived or at least from a marketing standpoint, business standpoint, if people didn't claim them that is better off for you?
A: Sure, book the asset [referring to ticket revenue] and not the liability [referring to fulfilling the obligation of paying out the awards] side of the equation. That's better numbers. (C.T. 22, Quenzel, pp. 149, 150).

Evidence at the June 13, 1989 post trial hearing in the Schreier case showed

question is not whether the liability is created but whether this liability is created by legal means.

The government alleged, and the Tenth Circuit also found that liability was fraudulently created because mileage was transferred from "nonmember passengers to members." This is in

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that American also subscribed to the same viewpoint as TWA. In a letter written by the managing director general accounting of American Airlines states:

"In a FFP [frequent flyer program], the most that is offered to a FFP member is the hope that they will in some way benefit from the program. They must hope that they will take enough trips to earn an award. They must hope that the program doesn't cease before enough miles are accumulated for an award. The FFP member must hope American will not have blocked usage of the travel award. And, they must hope that American doesn't change the number of miles needed to earn an award." (Tr. 73-74 (emphasis added)

It is clear that American acknowledges that it changes its rules to limit paying out on the obligation it undertook upon the creation of the Aadvantage program.

contrast to legal methods of creating liability for American by "pooling" or "coupon brokering" which involve the transfer of mileage between members or the flying of passengers under a member's name to accumulate mileage.[4] The governments theory of the case was that the miles belong to American until the passenger joins Aadvantage and the passenger doesn't gain any possessory interest in the miles until the passenger becomes an AAdvantage member. (Tr. 580-581) Thus, once the passenger becomes an AAdvantage member American retains no rights in the miles. All the government proved at trial was that mileage was transferred from a fare paying passenger

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[4] The trial court instructed the jury that defendants' coupon brokering and mileage pooling activities were not illegal--even though they violated the rules of American. (Tr. 119-120)

to an Aadvantage member. Because the government did not prove the fare paying passenger was a nonmember of Aadvantage, the government merely proved that mileage was being "pooled" between multiple passengers into one Aadvantage account.

The government failed to introduce any evidence that the passengers were nonmembers or that mileage was transferred without permission. Absent any proof of this essential element, the convictions cannot stand.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has decided important questions of federal law which should be decided by the Supreme Court. The Tenth Circuit's finding in this matter that frequent flyer mileage is property of the airline is in conflict

with a Ninth Circuit decision which found frequent flyer certificates to embody contract rights not property rights. These are the only two circuits which have addressed classification of frequent flyer mileage and they are in complete disagreement. The Petitioners Gayle and Irwin Schreier respectfully request this Court to examine the following questions and those other questions fully comprised therein.

1. Whether frequent Flyer Awards or Coupons are property rights within the parameters of the wire fraud statute, 18 U.S.C. section 1343.

2. Whether the mileage accumulated to obtain frequent flyer awards belongs to the passenger or to the airline.

3. Whether the accumulation of mileage credit in a manner which contravenes a company-made rule constitutes a scheme to defraud under 18 U.S.C. Section 1343, where the company received revenue and/or consideration for the very

mileage that it claims it was defrauded into crediting.

ARGUMENT

1. Frequent Flyer Awards, Coupons or Mileage Are Not Property Rights Within the Meaning of the Wire Fraud Statute.

The federal wire fraud and mail fraud statutes prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." The leading case interpreting this language of the fraud statutes is McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). McNally involved a scheme by which an insurance agency provided insurance for the state of kentucky and agreed to share its commissions with other insurance agencies selected by the Chairman of the state Democratic Party. The defendants were prosecuted for mail

fraud. The element of deceit or fraud lay in the defendants' failure to disclose the scheme to persons in state government whose actions or deliberations might have been affected by such information. The mail fraud count of the indictment alleged defendants had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly or indirectly, money and other things of value by means of false pretenses and the concealment of material facts.

Because the prosecution was not required to prove that the victim of the alleged fraud, had actually been deprived on any money or property, this Court reversed the convictions. This Court held that the mail fraud statute was intended to protect property rights, but

not "the intangible right of the citizenry to good government." 107 S.Ct. at 2879. This Court examined the legislative history and the early case law interpreting 18 U.S.C. Section 1341, and found that the application of the section should be "limited in scope to the protection of property rights." 107 S.Ct. at 2881. This Court stated that the statute's reference to schemes "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" should not be read disjunctively, but, rather, the word "defraud" also refers to "wronging one in his property rights." Id. at 2880-81 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)).

Shortly thereafter, this Court decided Carpenter v. United States, 484

U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). In that case, an employee of the Wall Street Journal engaged in a scheme that deprived the paper of its right to confidential information produced in the regular course of its business. At issue was whether the wire fraud statute, 18 U.S.C. Section 1341, reached this misuse of confidential information in which there was an acknowledged property interest. This court followed McNally, because "the mail and wire fraud statutes share the same language in relevant part," and applied the same analysis to both offenses under 18 U.S.C. Section 1341 and under 18 U.S.C. Section 1343. See 108 S.Ct. at 320, n.6. Accordingly, both the wire fraud statute and the mail fraud statute are limited to the protection of "property rights." Id.

Recently, in Transworld Airlines,

Inc. v. American Coupon Exchange, 913 F.2d 676 (9th Cir. 1990), the Ninth Circuit considered the issue of whether "frequent flyer" coupons embody rights of property or of contract, and other difficult legal issues arising from operation of "frequent flyer programs" Appellant American Coupon Exchange ("ACE") had appealed from a permanent injunction prohibiting it from brokering "frequent flyer" coupons awarded by Transworld Airlines ("TWA").

Initially, TWA's tariffs allowed a member to designate any person of his choice to use an award earned by the member. TWA then amended its tariffs in an attempt to prohibit the transfer of the awards. Finally, TWA amended its tariffs to allow a member to designate a family member, legal dependant or relative to use the award in his place.

The amended tariffs stated that any certificate issued to anyone other than a family member, legal dependant or relative would be void, as would any certificate deemed to have been sold or bartered.

ACE was a broker in the market for frequent flyer coupons.[5] Although it was clear that TWA was aware of this market since 1983, the parties disputed TWA's stance toward coupon brokers since that time. TWA claimed that it took a "measured response" to coupon brokering and "informally" attempted to discourage the practice. Id. at 679. ACE claimed

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[5] The Ninth Circuit found it "unsurprising that a secondary market for frequent flyer coupons [had] emerged in recent years" because the "most frequent of flyers may accumulate enough mileage credit for many, many awards." 913 F.2d at 679. The record before the district court indicated that more than forty coupon brokers were in operation. Id. n.3.

that TWA accepted brokering as a "fact of life" and "looked the other way" with its most valued customers by allowing them to sell certificates to "spurious 'relatives'". Id. In any event, TWA eventually "escalated its antibrokering efforts, by refusing to honor tickets purchased with brokered award coupons and ceasing to deal with ticket agents who accepted brokered coupons.

TWA's complaint against ACE alleged the intentional torts of fraud and interference with business relations, and requested declaratory and injunctive relief as well as damages. In its answer, ACE asserted the affirmative defenses of waiver, estoppel, laches, unclean hands, and privilege. ACE also asserted that the injunctive relief requested by TWA would further an illegal scheme in violation of the Sherman Act,

15 U.S.C. Sections 1 and 2. Finally, ACE averred that TWA's tariffs were unenforceable as "unreasonable restrictions upon the transfer of 'travel rights'" and therefore contrary to the public policy against restraints on alienation of property. Id.

TWA moved for summary judgment. It argued that frequent flyer award coupons were not "property" to which the policy of free alienation applied, and even if ACE's public policy argument were applicable, the tariffs were not "unreasonable restraints." Id. at 682. The trial court granted the injunction as requested by TWA and held that although the award coupons were property, TWA's tariffs were valid because they did not unreasonably restrain alienation. ACE appealed.

As a preliminary matter, the Ninth

Circuit noted that "frequent flyer programs constitute a fairly novel type of business device, one that has a substantial effect upon most if not all members of the traveling public." Id. at 689. The Ninth Circuit also noted that "there are no other appellate decisions addressing the character of the rights embodied by frequent flyer coupons." Id. at 686. (emphasis added)

At the time the Ninth Circuit entered its opinion it was unaware of the decision in the Schreier case which was in conflict with its opinion. After a lengthy discussion the Ninth Circuit found TWA's tariffs enforceable, and held that the public policy against restraints on alienation of property had no application to Frequent Flyer Bonus award coupons because the awards involved contract and not property rights. Id. at

686.

In determining that the character of the rights embodied by frequent flyer coupons evidenced rights of contract, TWA v. ACE discussed several cases in support of their decision. Bitterman v. Louisville & Nashville Railroad Co., 207 U.S. 205, 28 S.Ct. 91, 52 L.Ed. 171 (1907)[Conditions and terms of railroad tickets suggest contract rights.]; Kirby v. Union Pacific Railway Co., 51 Colo. 509, 119 P. 1042 (1911)[tickets are evidence of contract]Collister v. Hayman, 183 N.Y. 250, 76 N.E. 20 (1905) [theatre tickets are contracts] .

The Ninth Circuit TWA v. ACE court concluded that airline tickets were "undoubtedly just as contractual in nature as railroad and theatre tickets," Id. at 687, and that the frequent flyer coupons at issue before them resembled

"paradigmatic property rights even less than do the tickets considered by those earlier courts." Id. at 689. The court reasoned:

> the award coupons at issue here are actually one step removed from the ticket cases considered above, since a frequent flyer award is not even a ticket; it is merely the right to receive a ticket upon redemption of the coupon. We believe this further militates against classifying these awards a "property rights." It would be anomalous indeed if a coupon earned by the performance of a contract and redeemable for another contract became "property" simply by being reduced to a cardboard voucher during its brief period of limbo.

Id. at 688. "Consistency as well as reason" dictated that the Ninth Circuit follow in the path of their predecessors in determining that frequent flyer coupons involved contract rights. Id. at 689.

Another characterization of frequent flyer coupons examined by the Ninth Circuit, was that of a license. Citing to Collister the Court did not consider the theatre ticket to be either a contract right or a property right but instead they considered it a license.

> The ticket is not a contract, although to some extent it is evidence thereof. The contract is implied from the circumstances, and is an agreement on the part of the proprietor, for the consideration mentioned, to admit the holder of the ticket upon presentation with the right to occupy the seat specified and to there witness the performance. A theatre ticket is a license, issued by the proprietor, pursuant to the contract, as convenient evidence of the right of the holder to admission to the theatre at the date named, with the privilege specified, subject, however, to his observance of any reasonable condition appearing upon the

> face thereof. The license, although granted for a consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein.

76 N.E. at 21 (emphasis added).

Citing 53 C.J.S. Licenses Section 92 at 441 (1987), the Ninth Circuit noted that a license is neither a contract nor an interest in the subject property, and that the Collister court's classification of a ticket as a license had appeal from a theoretical standpoint. 913 F.2d at 687 n.7.[6]

Another Ninth Circuit decision, United States v. Kato, 878 F.2D 267 (9th Cir. 1989), is noteworthy. In Kato, the defendant was convicted of conspiracy, mail fraud, and false statement. The

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[6]. The Ninth Circuit adopted the contractual analysis because it "has greatly predominated." 913 F. 2d at 687 n.7.

mail fraud conviction was based on allegations that he defrauded the Federal Aviation Administration into issuing pilot licenses to those unqualified to receive them. Before trial, Kato had moved to dismiss certain counts of the indictment for failure to charge a crime under McNally, 107 S.Ct. 2875, inasmuch as there was no allegation that the FAA had been defrauded of money or property. The trial court denied the motion. Kato again raised the McNally issue by means of a motion for acquittal after the government had presented its case.

The Ninth Circuit reversed because the indictment and jury instructions permitted conviction for conduct that "does not constitute a violation of 18 U.S.C. Section 1341 defined by McNally." 878 F.2d at 269. The Ninth Circuit noted that under McNally "any benefit which the

government derives from the [mail fraud] statute must be limited to the Government's interest as a property holder,'" and Kato's indictment alleged neither a denial of the "'right to good government'" nor that Kato "'obtained property;" from the F.A.A.

878 F.2d at 269.

> Here, the government was defrauded into issuing certificates. But for Kato's scheme, the government would retain in its' possession a great number of blank sheets of paper in the form of unissued certificates. We do not understand the government to be arguing that the property right of which it was defrauded was the right to possession of those blank sheets of paper. Accordingly, the only property interest to be evaluated under McNally is the right conveyed by the issued certificates or licenses.

Id.

In United States v. Dadanian, 856 F.2d 1391 (9th Cir. 1988), the Ninth

Circuit considered the issue of whether a license constitutes property under McNally and concluded that a fraudulent scheme to obtain a license did not "affect [a] city's interests as a property holder." Id. at 1392. The Sixth Circuit considered the same issue and stated that a fraudulent scheme to obtain a license did not deprive the government of a property right because licenses, while property of the recipient once issued, are not property of the government either before or after they are issued. United States v. Murphy, 836 F.2d 248 (6th Cir. 988) Cert. denied 488 U.S. 924,109 S.Ct. 307,102 L.Ed.2d. 325 (1988). The Second Circuit stated that a relevant consideration in deciding whether a right is property under the federal fraud statutes is whether the right has been treated as a property

right in other contexts. U.S. v. Evans, 844 F. 2d 36 (2d Cir. 1988).

The most telling proof that tickets embody contractual rights are the tickets themselves. In this context it is significant that American's tickets admitted into evidence at trial contain the following on the reverse side:

> Conditions of Contract
>
> 1. As used in this contract "ticket" means this passenger ticket... (Exhibits 38, 39, 40) (Tr. 493).

Applying either the contractual analysis or the license theory, it is clear that American does not have any property interest in frequent flyer mileage. Therefore, defendants method of obtaining mileage does not deprive American of money or property. And under a classification of either contract or license, there was no evidence that

American, was deprived of money or property. Because frequent flyer awards are contract rights, the wire fraud statutes don't apply. In the Schreier case, federal criminal sanctions were improperly used to regulate private contracts.

In as much as American received revenue or consideration for the tickets which generated the miles and gave birth to the frequent flyer certificates, and the certificates were properly exchanged for tickets, there can be no claim of a tangible economic injury to American.

The Tenth Circuit misapprehends the nature of the wire fraud in the Schreier case in saying the case was "not essentially different from that in United States v. Giovengo, 637 F.2d 941 (3d Cir. 1980)" In Giovengo, airline ticket agents used their access to computer

generated tickets to collect from cash paying customers, pocket the money, returning to the airline as void the tickets the customers bought. The resulting harm to the airline was that the airline did not receive bargained-for revenue or consideration in exchange for providing passage. In the Schreier case the airline did receive revenue for the ticket which generated the claimed miles. The Tenth Circuit's comparison of the Schreier case to Giovengo is inappropriate.

2. Regardless of classification of the rights, frequent flyer mileage accumulation belongs to the passenger and not to the airline; therefore the indictment and the charge to the jury are fatally defective.

As recognized by the Second Circuit,

there is language in McNally [7] which indicates that a conviction will not stand under the wire and mail fraud statutes unless the party deceived is deprived of money or property. See U.S. v. Evans, 844 F.2d 36 (2d Cir. 1988) ("If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property; and see United States v. Covino, 837 F.2d 65, 71 (2d Cir. 1988) ("mail fraud requires a finding that the victim be defrauded of money or property.").

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[7] "The original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." 107 S. Ct. at 2879. "[A]ny benefit which the government derived from the [wire or mail fraud] statute[s] must be limited to the Government's interest as a property holder." 107 S.Ct. at 2881.

The Schreier case was premised upon the mileage belonging to American, the alleged victim. What the evidence in the Schreier trial showed was that whatever rights existed in the mileage, those rights did not belong to American. There was no proof that American was deprived of anything and therefore the Schreiers' convictions cannot stand. [8]

The Tenth Circuit has also interpreted McNally to require a showing that the victim of the fraudulent scheme was itself defrauded of money or property. See U.S. v. Shelton, 848 F.2d 1485 (10th cir. 1988) (en banc). U.S. v. Lance, 848 F.2d 1497 (10th Cir. 1988) (en banc).

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[8] The government conceded during Rule 29 argument that once a passenger joined the Program, the passenger and not American gained a "possessory interest in those miles." (Tr. 580-81)

3. The accumulation of mileage credit in a manner which contravenes American's Program rules does not constitute a scheme to defraud under 18 U.S.C. Section 1343.

At trial in the Schreier case, the government conceded and the court ruled that a violation of the Aadvantage rules is not a crime. The testimony showed that American consented to the pooling of miles even though it violated the program rules because American was generating revenue from the sale of the tickets. (Tr. 455)

As noted above, there is no evidence in the record whether the actual passengers whose names were replaced in the airline computer were members of Aadvantage. The most the government proved was that defendants violated American's rules. The trial court ruled that a rule

violation is not a violation of federal law. The law of the case was that pooling miles is legal. The Tenth Circuit overreached when it said the government conceded too much by "acknowledging that mileage pooling" is not a crime. The Tenth Circuit further overstepped the bounds of its appellate function of being a court of error by stating that this concession is not fatal to the government's case. Since it is precisely -- that pooling mileage is not unlawful in that it merely violates company rules -- this concession which formed the law of the case at trial, now constitutes the grounds compelling reversal of the convictions.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue Writ of Certiorari to review the judgments of the Court of Appeals for the Tenth Circuit.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No: 89-5126
	)	89-5127
	)	
GAYLE SCHREIER,	)	
IRWIN SCHREIER,	)	
	)	
Defendants - Appellants.	)	

Appeal from the United States
District Court for the Northern
District of Oklahoma
(D.C. No. 88-CR-57-B)

David J. Richman (Mark A. Pottinger with him on the brief) of Coghill & Goodspeed, Denver, Colorado, for Defendants-Appellants.

Gordon B. Cecil (Tony M. Graham, United States Attorney, and Ron Wallace, Assistant United States Attorney, on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee.

Before LOGAN and BALDOCK, Circuit Judges, and DUMBAULD*, District Judge.

LOGAN, Circuit Judge.

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* The Honorable Edward Dumbauld, Senior United States District Judge, United States District court for the Western District of Pennsylvania, sitting by designation.

In this direct criminal appeal the only issue is whether defendants Gayle Schreier and Irwin Schreier could have been properly convicted of twenty-six counts of wire fraud in violation of 18 U.S.C. § 1343.[1]

The Schreiers' conduct involved manipulation of the American Airlines Frequent Flyer AAdvantage Program (AAdvantage). Gayle Schreier, who worked in a travel service office, had access, to American Airlines' (American) computer reservation system, which stores passengers' names and flight information. On a number of occasions, Gayle accessed the system to replace the name of actual

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[1] Following trial but before sentencing defendants and the government reached an agreement dismissing all but three counts of fraud, two involving Gayle Schreier and one involving Irwin Schreier, which agreement also restricted the appeal of the issues and mandated that the Schreiers would not seek remand or retrial. Thus, the case presents us with a single issue, requesting that we either affirm the entire appeal or direct a judgment of acquittal.

passengers who had made particular flights with that of G. Johnson, a fictitious person whom Gayle had enrolled as a member of AAdvantage. Schreier also added the AAdvantage account number assigned to G. Johnson by American. The fictitious G. Johnson, therefore, received mileage credits in exchange for which American would issue coupons that could be used to acquire, without any cash payment, tickets for American flights. The record does not reflect whether the actual passengers, whose names were replaced in the airline computer, were members of AAdvantage. The passengers had not, however, requested that the mileage be credited to their AAdvantage accounts, if they were members, by submitting their account numbers to the airline.

Evidence was presented that coupons

were issued in exchange for mileage credited to G. Johnson. The coupons were exchange for

tickets and those tickets were used, although no evidence was presented linking the Schreiers to the issuance or use of the tickets.

Irwin Schreier's participation, by circumstantial evidence was apparently based on his knowledge of Gayle Schreier's actions and his having set up a number of mail drops, the addresses of which were provided to American as the addresses of fictitious AAdvantage members such as G. Johnson.

The appeal turns on the Schreiers' assertion that the government's proof is fatally flawed because it did not show that the Schreiers acquired property of

American; rather, if they acquired property of anyone it was of the real passengers, and the government provided no proof of any complaint by any of those passengers. Defendants assert that American had no property interest in the mileage because, as a property interest, it did not exist until claimed by a member passenger; that in American's hands, the mileage is a nullity, rights and duties associated with property do not arise until an AAdvantage member requests credit for the mileage flown. The Schreiers assert that the fact that the actual passengers had not claimed the mileage prior to flying did not foreclose them from eventually claiming it, because a non-member passenger could enroll in AAdvantage within twenty-four hours after

the flight and claim mileage credit in the program.[2] In addition, a member passenger who had neglected to provide American with his AAdvantage account number before the flight could provide that information by phone or mail after the flight and be credited with the mileage flown. Thus, argue the Schreiers, the "mileage" belonged to the passengers at least until the expiration of their twenty-four hour claim period. We do not agree.

Mileage credited to AAdvantage members is considered a liability of the

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[2] There was disputed evidence regarding whether mileage would be retroactively awarded even if the passenger joined within the twenty-four hour period. At least one airline employee indicated that the retroactive award of mileage is contrary to the rules of the AAdvantage program. However, all witnesses who were actually involved in the enrollment of AAdvantage members or the crediting of AAdvantage accounts testified that credit for just completed flights would be given to a newly enrolled member. For purposes of this opinion we assume American would honor credits retroactively. It makes no difference to our conclusion either way.

airline for accounting purposes. Because of American's policy allowing retroactive award of mileage, when a nonmember buys a ticket the airline acknowledges potential liability for mileage to this ticketholder. That liability comes into existence only if the ticketholder becomes a member of the AAdvantage program and requests that the mileage be credited to his account. The potential liability evaporates without consequences upon the expiration of the post-flight claim period if the passenger has not enrolled in the program and claimed the mileage.

The Schreiers' scheme involved the accumulation of mileage for which American would not otherwise be liable because it was not claimed by the passengers who actually flew. When liability is created

on American's books, through a transfer of mileage from nonmember passengers to members, the victim is American, because that corporation thereby owes a liability that otherwise would not exist. By their device of replacing nonmember passengers' names in the computer with a fictional name and account number, the Schreiers have victimized American, by fraud, and through use of computer access, wire fraud.[3] The wire fraud here is not essentially different from that in United States v. Giovengo, 637 F.2d 941 (3d Cir. 1980), where airline ticket agents used their access to computer generated tickets

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[3] In their brief on appeal, the Schreiers challenge the jury instruction on wire fraud, arguing that its failure to specify a victim conflicts with our en banc decision in United States v. Shelton, 848 F.2d 1485, (10th Cir. 1988). The defendants failed to object this instruction at trial. Therefore, in the absence of plain error, the error is not preserved for appeal. Kloepfer v. Honda Motor Co., 898 F.2d 1452, 1455-56 (10th Cir. 1990); Fed. R. Crim. P. 30.

to collect from cash paying customers, pocket the money, returning to the airlines as void the tickets the customers bought.

We have examined the indictment; it is consistent with our analysis and is not fatally defective. In acquiring mileage the Schreiers created liability for the airline, and obtained property for themselves. The Supreme Court has recognized that the taking of intangible property may be the basis of a wire fraud charge. See Carpenter v. United States, 484 U.S. 19, 25 (1987). We need not pursue a metaphysical argument regarding whether the "property" existed as such in the possession of American to conclude that the creation of a liability on the part of a corporation is no less the

misappropriation of its property than would be the theft of an asset worth an equal amount.

In attempting to refute the Schreiers' contentions on appeal, the government concedes too much, perhaps, by acknowledging that mileage pooling, which included booking American flights in the name of a fictitious person enrolled as a member of the AAdvantage program, when the miles were actually flown by a nonmember, is not a crime. But that concession is not fatal to its case. The issue is whether entering the computer and appropriating asserted "mileage" that, without the fraud, never would become a liability of American, is a crime.

AFFIRMED.

DUMBAUD, Senior District Judge, concurring.

The statute for violation of which defendants-appellants stand convicted (wire fraud under 18 U.S.C. § 1343) requires a scheme "for obtaining money or property" by false representations. The statute does not require that a defendant get the property. It is enough if someone or anyone obtains property pursuant to the fraudulent scheme "devised" by defendant. Tickets issued pursuant to the scheme of defendants-appellants in the case at bar which are usable or used for air travel, I am persuaded, are property. And defendants-appellants utilized wire transmission "for the purpose of executing such scheme."

As stated in Judge Logan's excellent

opinion

> Evidence was introduced that coupons were issued for mileage credited to G. Johnson [a fictitious name furnished to the airline by defendants-appellants]. The coupons were exchanged for tickets and those tickets were used, although no evidence was presented linking the Schreiers [the defendants-appellants] to the issuance or use of the tickets.

Upon these facts, [and assuming that the indictment suffices under Stirone v. U.S., 361 U.S. 212, 217 (1960)], a violation of the statute has been established.

Accordingly, I join in the judgment of affirmance and in the majority opinion. I write separately merely to disavow explicitly the Government's contention, accepted by the District Court, that the "miles" traveled by some passenger and

utilized by someone else to obtain a free ticket good for air travel constitute "property" and property of American Airlines. (If a mere number manipulable in a computer is property at all, it would be property of the passenger who earned it under the airline's promotional plan, not of the airline itself). Noncompliance with that plan is pertinent in proving the fraudulent representation element of the offence, not the element of obtaining property.

A judgment can properly be affirmed for reasons other than those given by the District Court. Lindsey v. Dayton-Hudson Corp, 592 F.2d 1118, 1124 (10th Cir.), cert. denied, 444 U.S. 856 (1979).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
vs.	)	No: 89-5126
	)	89-5127
	)	
GAYLE SCHREIER,	)	
IRWIN SCHREIER,	)	
	)	
Defendants - Appellants.	)	

ORDER

Filed August 8, 1990

Before LOGAN and BALDOCK, Circuit Judges, and DUMBAULD*, District Judge.

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*The Honorable Edward Dumbauld, District Judge, of the United States District Court for the Western District of Pennsylvania, sitting designation.

This matter comes on for consideration of appellants' petition for rehearing filed in the captioned cases.

Upon consideration whereof, the

petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk